UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

TGF MANAGEMENT GROUP HOLDCO, INC, Employer and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 469 Charging Party	)	Case No. 22-CA-123003

CHARGING PARTY'S OPPOSITION TO
EMPLOYER'S MOTION FOR SUMMARY JUDGMENT

Charging Party International Brotherhood of Teamsters Local 469 (hereafter "Local 469") submits the following Opposition to Respondent, TGF Management Group Holdco, Inc.'s (hereafter "Toll") Motion for Summary Judgment.

Local 469 is the certified exclusive bargaining representative for certain employees at Toll's facility in Carteret, New Jersey. The Complaint in the instant case alleges that Toll failed and refused to bargain with Local 469 regarding the termination of its employee Imber Espinosa prior to actually discharging Mr.

Espinosa.[1] Such bargaining is required under the rationale enunciated by the Board in *Alan Ritchey*, 359 N.L.R.B. No. 40 (2012).

Toll's Motion must be denied because, contrary to Toll's suggestions, there are disputed material issues of fact that can only be resolved by a hearing before an administrative law judge.

I. Disputed Issues of Material Fact Render Summary Judgment Inappropriate

In considering motions for summary judgment, the Board *generally* applies the standard set forth in Federal Rule of Civil Procedure Rule 56(c), which provides for the entry of summary judgment where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Manville Forest Products Corp.,* 269 N.L.R.B. 390, 390 (1984). As under Rule 56, the pleadings and evidence are viewed in the light most favorable to the nonmoving party. *Petrochem Insulation, Inc.*, 330 N.L.R.B. 47, 52, n.20 (1999), *enf.* 240 F.3d 26 (D.C. Cir. 2001); *Eldeco, Inc.*, 336 N.L.R.B. 899, 900 (2001).

Rule 56 can only provide limited guidance because NLRB procedure does not provide for pre-trial discovery devices such as interrogatories or requests for

[1] The Motion notes that Mr. Espinosa is a member of Local 469, which is true. For purposes of the Act, however, it is his membership in the bargaining unit represented by Local 469 that gives rise to the violation.

admissions. [2] NLRB Rule & Regulation 102.30 allows depositions, but only to preserve testimony of witnesses unavailable for trial, not for discovery purposes. *See, NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 859 (2d Cir.1970); *Bill Johnson's Restaurants, Inc.*, 249 N.L.R.B. 155, 166 (1980), *enf.* 660 F.2d 1335 (9th Cir. 1981).

While affidavits are the principle means utilized by regional offices to investigate charges, the Board applies the *Jencks* rule and prohibits disclosure of the affidavits, or even the identity of the affiants, unless or until the affiant testifies at trial. NLRB Rules and Regulations 102.118(b) (1); *Ra-Rich Mfg. Corp.*, 121 NLRB 700 (1958); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-240 (1978) (approving Board's practice), *See also, Bashas', Inc.*, 352 N.L.R.B. 661 (2008) (granting General Counsel's special appeal and reversing ALJ's ruling requiring General Counsel to provide respondent with the names of witnesses General Counsel intended to call at the hearing.)

Thus, NLRB Rule & Regulation 102.24(b) provides that, with regard to motions for summary judgment:

> It is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence

[2] "Indeed, when enacting [NLRB Rule] Sec. 102.24, the Board, noting the contrary requirements of Rule 56(e) of the Fed.R.Civ.P. reasoned that it would be impracticable for the Board to follow Rule 56(e) because unlike Federal Courts, the Board has never allowed prehearing discovery as such. See, 54 *Fed.Reg.* 38516 (1989)" *Kiro, Inc.* 311 N.L.R.B. 745, 746, n. 4 (1993)

> of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist."

See, *Lake Charles Memorial Hospital*, 240 N.L.R.B. 1330, 1331, n. 3 1979) ("[A] simple denial of unlawful conduct is sufficient to raise a material question, without requiring respondent to come forward with affidavits or other evidence."); *Kiro, Inc.*, 311 N.L.R.B. 745, 746 (1993) ("Nor do we believe that it was incumbent on the General Counsel, during the motion stage of the proceeding, to set forth the precise facts on which he relies."); *United Postal Service*, 311 N.L.R.B. 254, n.3 (1993) ("[I]t is not the Board's usual procedure to require more than allegations of legally significant factual issues to warrant a hearing in an unfair labor practice matter.")

Toll's Motion contains extensive recitation and argument of what it characterizes as "undisputed facts", supported by the lengthy declaration of Michael Divirgilio, Toll's Director of East Coast Operations. A review of Mr. Divirgilio's declaration, together with the pleadings, demonstrates material issues of fact in dispute.

In this case, the General Counsel issued a Complaint alleging, inter alia, that Local 469 is a labor organization under the Act (*Complaint*, Para. 4), that Local 469 requested bargaining over Mr. Espinosa's discharge (*Complaint,* Para. 12) and that Toll failed and refused to bargain over the discharge (*Complaint*, Para. 13).

Toll specifically denies all of these allegations. (*Answer*, Paras. 4, 12 and 13).[3] Under these circumstances, it is undisputed that there are material issues of fact rendering summary judgment inappropriate. *Florida Steel Corp.*, 222 N.L.R.B. 586, 587 (1976) ("Respondent's amended answer having been accepted, denial by it of the commission of the alleged unlawful acts raises a question of fact and law requiring resolution through a hearing before an Administrative Law Judge.")

Mr. Divirgilio's declaration reinforces the conclusion that material issues of fact exist. At paragraph 13 of his declaration, which is attached to Toll's motion, Mr. Divirgilio avers that "It is my understanding that the National Labor Relations Board may be taking the position that Mr. Reyes had no opportunity to bargain because Toll had unequivocally made up his mind." Mr. Reyes is Local 469's steward at the Carteret facility.

Mr. Divirgilio's anticipation of the General Counsel's argument demonstrates a material issue of fact that Toll obviously understands to be disputed. As outlined above, the General Counsel need not respond to Mr. Divirgilio's anticipatory argument by presenting specific facts to contradict it. *Kiro, Inc.*, 311 N.L.R.B. 745, 746 (1993). It is sufficient that Mr. Divirgilio, Toll's agent, denies it.

[3] Curiously, despite having participated in an election and bargaining with Local 469, Toll's denial of Local 469's labor organization status is in the form of an assertion that Toll "lacks sufficient knowledge or belief to admit or deny" the Local's status and so "denies each and every allegation set forth [in Paragraph 4 of the Complaint]." While not as direct as Toll's other denials, it nonetheless presents a material issue of fact disputed between the parties.

II. Toll's Motion for Summary Judgment Should Be Denied Because It Constitutes an Attempt at Pre-Trial Discovery

As outlined above, the NLRB's rules do not provide for pre-trial discovery. Toll's Motion for Summary Judgment does not argue that the pleadings, on their face, demonstrate that there are no material facts in dispute, entitling Toll to judgment as a matter of law. Instead, Toll relies on its manager's declaration to characterize the evidence it apparently intends to present at the hearing. This very declaration, together with Toll's Answer, demonstrates Toll's awareness that there are material facts in dispute. This suggests the true purpose of the motion is to elicit a response from the General Counsel that provides a preview of the evidence to be presented at trial.

This conclusion is reinforced by Toll's *Application To Take Deposition of Elliot Reyes,* attached as Exhibit A, served on Local 469 shortly after the Motion for Summary Judgment was filed.[4] Despite long-standing Board precedent that "good cause" under §102.30 is limited to preserving testimony for trial and not discovery, Toll proposes to depose Mr. Reyes for the sole purpose of pre-trial discovery.

For all the reasons cited above, Toll's Motion for Summary Judgment should be denied.

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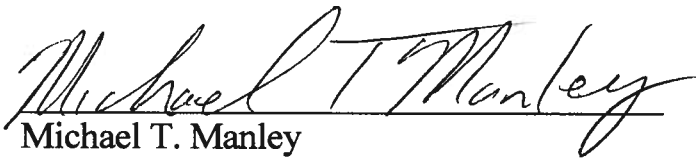
[4] For reasons set forth in Local 469's *Opposition To Employer's Application To Take Deposition of Elliot Reyes*, Toll's application to depose Mr. Reyes should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that *Charging Party's Opposition to Employers Motion for Summary Judgment* was filed with the Executive Secretary via the NLRB's website on August 18, 2014. The following parties were also served copies via electronic mail on August 18, 2014:

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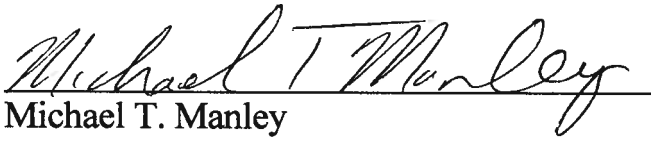

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

TGF MANAGEMENT
GROUP HOLDCO, INC.

and

Case 22-CA-123003

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 469

APPLICATION TO TAKE DEPOSITION OF ELLIOT REYES

Respondent TGF Management Group Holdco, Inc. d/b/a/ Toll ("Toll" or "Respondent") hereby submits its Application To Take Deposition Of Elliot Reyes in the above-referenced matter pursuant to Section 102.30 of the Board's Rules and Regulations.

The hearing in this case is set for September 9, 2014. Toll has concurrently filed a motion for summary judgment. If the motion for summary judgment is denied, or if the hearing is continued because the Board issues an Order to Show Cause why the motion should be granted, Toll requests an order that it be permitted to conduct one deposition prior to the hearing. Toll seeks to depose Elliot Reyes, a shop steward for the International Brotherhood of Teamsters, Local 469 (the "Union"). The factors set forth in Section 102.30(a) are addressed below.

I. GOOD CAUSE EXISTS TO TAKE MR. REYES' DEPOSITION.

This is a straightforward case that contains only one claim. Imber Espinosa worked as a regional truck driver for Toll. Mr. Espinosa is a member of the International Brotherhood of Teamsters, Local 469 (the "Union"). On January 15, 2014, Mr. Espinosa

EXHIBIT A

II. THE DEPOSITION WOULD BE CONDUCTED AT A TIME AND PLACE MUTUALLY AGREEABLE BETWEEN TOLL AND THE UNION.

Mr. Reye's address is 13 Wilson Avenue, North Plainfield, NJ 07060. Toll proposes to take Mr. Reyes' deposition before a certified court reporter at Regus, 30 Knightsbridge Road, Suite 525, Piscataway, New Jersey 08854 on August 28, 2014 commencing at 10:00 a.m.

If this time and place is not convenient for Mr. Reyes or the Union, Toll will agree to conduct the deposition at a mutually agreeable time and place, as long as it is sufficiently in advance of the hearing to give the parties time to receive and review the transcript prior to the hearing.

Dated: August 13, 2014

Respectfully submitted,

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EXHIBIT A